Supreme Court, U. S.
FILED
OCT 3 1975
MICHAEL RODAK, JR., CLERK

No. 75-129

In the Supreme Court of the United States

OCTOBER TERM, 1975

GARY SUCHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-129

GARY SUCHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that when the court of appeals reversed his conviction on a conspiracy count it should have remanded his case for a new trial on the substantive counts of the same indictment, as hearsay, inadmissible on the substantive counts, had been admitted on the conspiracy count.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to distribute one-

eighth of a kilogram of heroin, in violation of 21 U.S.C. 846 (Count I), possession of 21.6 grams of heroin, in violation of 21 U.S.C. 844(a), a lesser included offense (Count II), possession of 189 grams of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count III), and distribution of 189 grams of heroin, also in violation of 21 U.S.C. 841(a)(1) (Count IV).

Petitioner was sentenced to concurrent five-year terms of imprisonment on Counts I, III, and IV and to a concurrent one-year term of imprisonment on Count II. The court of appeals affirmed the conviction on the substantive counts but reversed the conspiracy conviction (Pet. App. B, pp. 29-31). A petition for rehearing, apparently untimely filed (see Pet. App. C, p. 35) was denied on June 5, 1975 (App., *infra*). The petition for a writ of certiorari was not filed until July 23, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the writ.

The evidence presented at trial showed that on December 13, 1972, undercover agent Taylor of the Detroit Police Department met with Luther Gist at a local store to discuss the purchase of one-eighth of a kilogram of heroin (Tr. 18-19, 23-24).[1] At that time Gist stated that he had been in contact with his source and that the source, whom Gist described as a "small Caucasian hillbilly-type person," had told

[1] "Tr." designates the transcript of the trial in the district court.

him "that he was attempting to get it together" and would let Gist know when he could deliver (Tr. 24-25). Later the same day Gist told Taylor that his source was leery about coming down to the area of the city where the store was located at that time of night and would prefer to deliver in the morning (Tr. 25-26).

The next morning Taylor again met with Gist at the store (Tr. 27). Gist stated "that he had been in contact with his man * * * [whose] name was 'Gary', and that Gary was still leery" (Tr. 27). Gist stated that he would try to contact his other source, an individual named "Bozo" (Tr. 27-28). Taylor told Gist that he would be across the street when the source arrived and would come in and get a sample (Tr. 28). Taylor also stated that his tester, who was traveling with him, would remain in his car and would have to test the substance before Taylor would complete the purchase (Tr. 28). Taylor returned to his vehicle, parked across the street from the store, and notified the surveillance personnel that the source should be delivering the heroin between 12:30 p.m. and 1:00 p.m. (Tr. 29).

When petitioner, who at that time had long hair, arrived and entered the store, Taylor walked in behind him (Tr. 30-32, 108-109). There Taylor observed petitioner and Gist briefly converse (Tr. 32). Petitioner left the store and returned to his vehicle (Tr. 32, 109). Outside, Drug Enforcement Administration (DEA) Special Agent Melvin E. Smith,

posing as Taylor's tester (Tr. 28-29, 105-107), observed petitioner enter his vehicle and return to the store "with a little white paper bag in his hand" (Tr. 109-110; see also Tr. 33-34). Inside, Gist introduced Taylor to petitioner (Tr. 34), and petitioner gave the white bag to Gist (Tr. 34). Gist instructed Taylor to accompany him to the basement, where they discussed the previous arrangements, including the price (Tr. 33, 35). Taylor asked for a sample, and Gist removed an off-white powder from a plastic packet in the white bag, placed it in a tin foil wrapper, and handed it to Taylor (Tr. 35-36). Taylor left the store and walked to the vehicle in which Smith was waiting (Tr. 36, 110-111). A field test conducted by Smith on the powder confirmed that it was heroin (Tr. 111-112; see also Tr. 14-15, 152-153).

The surveilling officers were notified to begin making arrests (Tr. 36, 40, 112-113). An officer of the Narcotics Bureau of the Detroit Police Department entered the store and proceeded to the rear (Tr. 115-119). He observed petitioner sitting on a flight of stairs leading to the second floor (Tr. 119-120). As the officer climbed past petitioner he noticed several small manila envelopes placed under the door at the top of the stairs about twelve inches away from petitioner (Tr. 120-122). He recovered the envelopes and forced open the door (Tr. 122). Except for the officer, petitioner was the only person near the top of the stairs. Tests revealed that the envelopes contained about 21.6 grams of heroin (Tr. 16, 135-136, 153).[2]

At about the same time, a DEA Special Agent entered the store (Tr. 130-132). He observed Gist run toward the back room (Tr. 132). After the agent told him to stop, Gist halted and threw a white paper bag to the floor (Tr. 132). Tests revealed that the contents of the bag consisted of 189.38 grams of heroin (Tr. 15, 134, 153).[3] When petitioner was arrested (Tr. 135), a search of his person revealed $1220, including eleven $100 bills (Tr. 137-138).

Petitioner testified on his own behalf (Tr. 176-203). He claimed that Smith and not Taylor was in the store at the time of the alleged transaction (Tr. 185-186). Petitioner denied handing Gist the white bag containing narcotics and denied having been involved in the sale of the narcotics (Tr. 186-193, 201).

Petitioner contends that since the court of appeals reversed his conspiracy conviction, his conviction on the three substantive counts was not based on substantial evidence (Pet. 10-26). The court of appeals reversed petitioner's conspiracy conviction because, aside from Taylor's testimony regarding statements Gist had made, there was insufficient proof of conspiracy (Pet. App. B, p. 30). Gist was dead at the time of trial (Tr. 52), and the court did not consider Taylor's testimony as to his statements sufficient

---

[2] This heroin formed the basis for Count 2 of the indictment.

[3] This heroin formed the basis for Counts 3 and 4.

to support the conspiracy conviction. The court nevertheless correctly concluded that "there was ample evidence to support the jury conviction of the defendant on the other counts and that such evidence was independent of any hearsay evidence which was admitted under the exception which obtains in conspiracy cases" (Pet. App. B, pp. 30-31). It is clear from the court's opinion that it did not assess the non-hearsay evidence merely by normal standards of sufficiency, but rather with special sensitivity to the problems that arise from the joinder of conspiracy and substantive charges. Even under this more stringent standard it concluded, quite correctly in our view, that the evidence of petitioner's guilt on the substantive counts was so strong as to leave no doubt regarding prejudice. This determination does not merit further review. See *United States* v. *Johnson*, 462 F.2d 608 (C.A. 8), certiorari denied, 409 U.S. 952.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

---

[4] *United States* v. *Lucido*, 486 F.2d 868 (C.A. 6), upon which petitioner relies, is inapposite. In that case, unlike petitioner's, the court of appeals found no independent evidence to support the defendant's conviction on the substantive count after it reversed the conspiracy count.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1937

[Filed June 5, 1975, John P. Hehman, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GARY SUCHY, DEFENDANT-APPELLANT

ORDER

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges.

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard in banc.

It appearing to the court that no judge has requested that a vote be taken on said suggestion, the petition for rehearing was considered by the panel and was determined not to be well taken.

It is therefore ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 593087 55